

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Highland Wind Farm, LLC, for a Certificate of Public Convenience and Necessity to Construct a 102.5 Megawatt Wind Electric Generation Facility and Associated Electric Facilities, to be Located in the Towns of Forest and Cylon, St. Croix County, Wisconsin

2535-CE-100

ORDER TO REOPEN

This is the Order on the Highland Wind Farm, LLC (Highland) Petition to Reopen, or in the alternative, for Rehearing ([PSC REF#: 183159](#)). The Commission considered this Petition, and responses filed by intervenors Forest Voice and the town of Forest, at its open meeting on May 2, 2013. The proceeding is reopened under Wis. Stat. § 196.39(1).

A reopening is appropriate under the unique circumstances of this case. However, the proceeding is reopened for the limited purpose of taking evidence on whether and how Highland's proposed project can meet the noise standards in Wis. Admin. Code ch. PSC 128.

In a separate notice, the Administrative Law Judge shall issue a Notice of Prehearing Conference. That Notice shall identify specific issues to be addressed at hearing. While sufficient time should be scheduled to provide intervenors with the opportunity to provide countervailing evidence, this reopened proceeding should be completed as soon as practicable.

Because this matter is reopened under the Commission's own motion under Wis. Stat. § 196.39(1), the Commission does not reach a decision regarding Highland's contention that the proceeding be reopened under Wis. Stat. § 227.49(3).

Commissioner Nowak dissents and writes separately (attached).

Dated at Madison, Wisconsin, this 10th day of May, 2013.

By the Commission:



Sandra J. Paske
Secretary to the Commission

SJP:JAL:cmk:DL:00722505

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Highland Wind Farm, LLC, for a Certificate of Public Convenience and Necessity to Construct a 102.5 Megawatt Wind Electric Generation Facility and Associated Electric Facilities, to be Located in the Towns of Forest and Cylon, St. Croix County, Wisconsin

2535-CE-100

DISSENT OF COMMISSIONER ELLEN NOWAK

I dissent from the Commission's decision to reopen the Highland Wind Farm application for a Certificate of Public Convenience and Necessity (CPCN) to build a 102 megawatt wind farm (Project) under Wis. Stat. § 196.39(1). Highland Wind Farm, LLC (applicant), did not present any reason why the Commission should exercise its discretion and reopen the proceeding. The Commission's decision allows the applicant to present a new legal argument after its previous arguments failed, which is not proper justification for reopening. Moreover, the applicant will be presenting a redesigned Project under its own interpretation of Wis. Admin. Code § PSC 128.14, a concept which was vehemently rejected by the applicant during the original proceeding.

The applicant asked the Commission to reopen the case in order to present new modeling based on a combination of technical information in the record and a novel legal interpretation of the wind siting laws. The applicant is asking the Commission to consider curtailment as a design factor and to allow new modeling which demonstrates that the Project is capable of operating below the sound limits set by the Commission if curtailment is used.

Wisconsin Stat. § 196.39(1) gives the Commission the authority to reopen a case, following the issuance of a final order, for any reason. It is a useful tool, but the Commission

must be mindful of overusing it. While we clearly have the authority, it is not appropriate to exercise that authority in order to allow a new legal argument or approach when previous arguments have been rejected. Reopening this docket sets a precedent whereby losing parties will need nothing more than a new approach on an argument to have a final decision reopened.

The majority's Order to Reopen states that a "reopening is appropriate under the unique circumstances of this case." This case, however, is not unique. It is not a unique situation for the Commission to issue a decision that an applicant does not anticipate, and doing here so does not warrant giving this applicant the opportunity to present a different legal opinion or different modeling to support an application. The information presented by the applicant is not new. It could have been, but was not, explored during the initial case. Nothing has changed since the Commission's initial rejection of the application. Thus, there is nothing unique about this proceeding.

Parties need and deserve certainty in our decisions. The intervenors in this proceeding spent significant time and resources evaluating the application and record presented by the applicant. Only after the CPCN was rejected did the applicant concoct a new legal theory to meet the Wis. Admin. Code ch. PSC 128 sound limits. The intervenors will now be asked to address different argument, and possibly on an expedited schedule.

The Order to Reopen also states that this reopener is for the limited purpose of taking evidence on whether and how the applicant's proposed Project can meet the noise standards in Wis. Admin. Code ch. PSC 128, but that is an oversimplification. Changing one model parameter can have a significant effect on the results. For example, changing the speed at which the turbines operate can affect bird and bat mortality rates. Similarly, micro-siting can affect

shadow flicker on nearby residences. We would be remiss to consider one model parameter in isolation, and I expect the parties will fully re-address all of these issues.

In addition to the new legal argument, the applicant states it will present what would be considered, under the applicant's interpretation of Wis. Admin. Code § PSC 128.14, a redesign of the project.¹ The applicant spent significant time and energy rejecting the option of redesigning the Project to meet sound limits during the original application process.² The intervenors were willing to present redesign options, but the applicant continually (and successfully) argued that the evaluation was of the Project as presented, and that any suggestion of redesign should be struck from the record.

The applicant also successfully argued that any redesign proposal by the intervenors, which was presented in November, should have been presented with direct testimony in August, before the technical hearing, so it could have been fully vetted during the proceeding.³ However, now that the Project, as presented, was rejected by the Commission, the applicant is more than willing to propose a "design" change, along with an expedited timeline for the Commission and other parties to evaluate the proposal.

If the Commission agrees with the applicant's interpretation of Wis. Admin. Code § PSC 128.14, it is illogical to allow the applicant to contradict an argument on which they relied throughout the case. A redesigned project should require a new CPCN application.

¹ The applicant interprets Wis. Admin. Code §§ PSC 128.14(2)-(4) to allow curtailment as a design factor, meaning curtailment can be used in the design phase of the project to show compliance with applicable noise standards. Under that interpretation, changing the curtailment parameters would amount to a project redesign. I do not necessarily agree with this interpretation.

² Highland Response Brief to Town of Forest Appeal (Dec. 10, 2012) at 6-7. (PSC REF#: 177677.)

³ *Id.* at 7.

Docket 2535-CE-100

I also disagree with my colleagues' position that we should reopen this case because we expect the applicant to file a new CPCN application if we choose not to reopen. Re-filing a new application is an option for any applicant. The mere threat of doing so should not affect our decision on whether to reopen. This frustrates the need for finality to our decisions.

For the reasons above, I dissent from the decision to reopen the Highland Wind Farm CPCN application under Wis. Stat. § 196.39(1).

EN:EN:DB:sp\2535-CE-100 Dissent.docx

DL: 00723103